**HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI**
**AND**
**HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY**

**Writ Appeal No. 863 of 2006**

**Between:**

M/s United Freight Carriers (Vizag) Pvt. Ltd., Visakhapatnam, represented by its Managing Director. … Appellant

**And**

Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant, represented by its Chairman & Managing Director, Visakhapatnam & others. … Respondents

**:: J U D G M E N T ::**

Counsel for the appellant : Shri P. Venu Gopal

Counsel for respondent Nos. 1 to 5 : Shri V. Ravinder Rao

**June 19, 2007**

**Per G.S. Singhvi, CJ**

In **Ramana Dayaram Shetty v. International Airport Authority of India**[1], **Dwarakanath Marfatia and Sons v. Board of Trustees of the Port of Bombay**[2], **Mahabir Auto Stores v. Indian Oil Corporation**[3] and **Shrilekha Vidyarthi v. State of U.P.**[4], the Supreme Court held that non-arbitrariness is a necessary concomitant of the rule of law, which constitutes the cornerstone of our constitutional set up and every State action must be in public interest and free from arbitrariness. In **Shrilekha Vidyarthi**'s case (supra), the Supreme Court considered the earlier judgments and laid down the following propositions:

> " 1) Every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind. Arbitrariness is anathema to State action in every sphere and wherever the vice percolates, this Court would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India.
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> 2) Conferment of the power together with the discretion which goes with it to enable proper exercise of the power is coupled with the duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred, which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. All persons entrusted with any such power have to bear in mind its necessary concomitant which alone justifies conferment of power under the rule of law.
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> 3) The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the

act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always.

4) The scope of judicial review is limited to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the Courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. The power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

5) There is a presumption of validity of the State action and the burden is on the person who alleges violation of Art. 14 to prove the assertion. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repeal the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, the State action must perish as arbitrary."

The propositions laid down in **Shrilekha Vidyarthi**'s case (supra) generated enormous litigation in relation to contractual matters involving the State and its agencies and instrumentalities. This necessitated laying down of clear guidelines about the scope of judicial review in such matters.

In **Tata Cellular v. Union of India**[5], **New Horizons Ltd. v.**

**Union of India**[6], **Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.**[7], **Raunaq International Ltd. v. I.V.R. Construction Ltd.**[8], **Air India Ltd. v. Cochin International Airport Ltd.**[9], **Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn.**[10], **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.**[11], **Reliance Airport Developers (P) Ltd. v. Airports Authority of India**[12], **Noble Resources Ltd. v. State of Orissa**[13], **B.S.N.Joshi & Sons Ltd. v. Nair Coal Services Ltd.**[14] and **Ramachandra Murarilal Bhattad v. State of Maharashtra**[15], the Supreme Court, while reiterating that the broad concept of equality will apply to State action in contractual matters, cautioned against undue expansion of the scope of judicial review. In **Tata Cellular v. Union of India** (supra), the Supreme Court held:

"The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. The decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

(iii) Procedural impropriety."

In **Raunaq International Ltd. v. I.V.R. Construction Ltd.** (supra), the Supreme Court enumerated the factors which are to be kept in mind while awarding contract and held:

> "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:
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> 1) the price at which the other side is willing to do the work;
> 2) whether the goods or services offered are of the requisite specifications;
> 3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
> 4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
> 5) past experience of the tenderer and whether he has successfully completed similar work earlier;
> 6) time which will be taken to deliver the goods or services; and often
> 7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction."

In **B.S.N.Joshi & Sons Ltd. v. Nair Coal Services Ltd.** (supra), the Supreme Court culled out ten principles, which should normally guide the State in awarding contracts etc. and emphasised the need for judicial restraint in dealing with such matters. These are:

" i) The requirements in a tender notice can be classified into two categories: those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition.

ii) If there are essential tender conditions, the same must be adhered to. If a party fails and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others;

iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction;

iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of such tender conditions, ordinarily again a power of

relazation may be held to be existing. The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

vi) The bidding contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

viii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it.

ix) A contract need not be given to the lowest tenderer and the employer is the best judge therefore; the same ordinarily being within the employer's domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities.

x) Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor."

We have prefaced disposal of this appeal by taking note of the

legal principles which have bearing on the Court's power to scrutinise the State action in contractual matter because, after perusing the record of the appeal and hearing learned counsel for the parties, we are convinced that the order passed by the learned Single Judge in Writ Petition No.6075 of 2006 refusing to entertain the appellant's challenge to the appointment of respondent No.6 as Consignment Agent for handling and storage of pig iron and steel materials of Visakhapatnam Steel Plant at different places including Kochi and Bhubaneshwar, does not suffer from any legal error warranting interference under Clause 15 of the Letters Patent.

Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant (respondent No.1 herein) issued notice dated 1.12.2005 inviting sealed tenders from experienced/established agencies for appointment as Consignment Agent for handling and storage of pig iron and steel material of the Plant at different places. The appellant and respondent No.6 were among those who submitted tenders. The technical bids were opened on 6.1.2006. The tender of the appellant was rejected on the ground that experience certificate produced by it did not satisfy the Special Condition specified in Clause 5 of the tender notice. The appellant made representation dated 15.2.2006 for re-consideration of its tender by asserting that it had executed similar work on behalf of M/s.Chamundi Industries Limited of Bangalore, but the concerned authority did not accept the same. The price bids of the qualified bidders were opened on 22.3.2006 and the bid of respondent No.6 was accepted.

The appellant challenged the rejection of its tender mainly on the ground of violation of Article 14 of the Constitution by asserting that even though it fulfilled all the conditions specified in the tender notice and produced evidence regarding the experience in execution of similar work on behalf of M/s.Chamundi Industries Limited during the

financial year 2000-2001, respondent No.1 arbitrarily refused to consider its price bid and appointed respondent No.6 as Consignment Agent.

In the counter filed on behalf of respondent Nos.1 to 5, it was pleaded that the experience certificate produced by the appellant did not satisfy the condition enumerated in Clause 5 of the tender notice and Clause 11 of the instructions issued to the tenderers and, therefore, its tender was not entertained.

The learned Single Judge referred to the relevant clauses of the tender notice, the pleadings of the parties and held as under:

> "Since the N.I.T. requires that the tenderer should have experience in all the activities from the stage of receipt of material to the dispatch of material and since the nature of work involved in consignment agency required a contractor to undertake all the activities, the tender committee opined that the petitioner did not satisfy the requisite past experience. The tendering process does not involve sending of any communication to the tenderer in the event of failure to satisfy the technical qualification criteria. The plea of the petitioner that he was orally informed about the rejection of the technical bid has been denied.
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> Admittedly, the technical bids were processed by a duly constituted tender committee who had opined that the petitioner did not satisfy the requisite past experience. The record placed before this Court by the learned Counsel for the respondents shows that the issue was considered in detail in the meetings held on 24-1-2006 and 25-1-2006 in the office of the Additional General Manager (Marketing) and it was recorded in the minutes that the quantity of work executed by the writ petitioner did not fulfill the minimum quantity requirement, and therefore his technical bid did not meet the requirement of experience as per the terms of NIT, which is a fatal condition. Thereafter, on a representation made by the petitioner, dated 7-2-2006 and 15-2-2006 addressed to the Chief Vigilance Officer, Visakhapatnam with copies marked to various senior officers, the matter was reconsidered in the meetings held on 13-2-2006 and 14-3-2006 in the office of the Additional General Manager (Marketing), and on verification of the relevant documents it was found that the earlier decision of the tender committee was in order. From the record placed before this Court, it is clear that the petitioner was

disqualified not on the ground that in the work order issued by M/s. Chamundi Industries it was mentioned *loading / unloading* and thus assuming that the petitioner company did not handle loading as well as unloading. Hence, the contention of the petitioner that the rejection of the technical bid of the petitioner was on a flimsy and technical ground is absolutely incorrect and appears to be an after-thought for the purpose of the present writ petition."

The learned Single Judge noted that the technical bid offered by the petitioner (the appellant herein) was rejected on an additional ground that its profit and loss account for the year 2000-2001 does not reflect any income from handling charges and it did not possess service tax registration during that year and observed:

"Though the petitioner contends that the concept of payment of service tax was not in vogue when the petitioner executed the work with M/s. Chamundi Industries, the same cannot be accepted since the services of clearing and forwarding agents have been brought into the net of service tax by the Finance Act, 1997 w.e.f. 16-7-1997 itself. Similarly, cargo handling services have been subjected to service tax by the Finance Act, 2002 w.e.f. 16-8-2002. Hence, the non-registration of the petitioner under the Service Tax Rules during the year 2000-01 undoubtedly is a relevant aspect to be taken into consideration."

The learned Single Judge then referred to the principles laid down in **Tata Cellular v. Union of India** (supra) and **Air India Ltd. v. Cochin International Airport Ltd.** (supra) and held:

"In the case on hand, there is absolutely no pleading or any material to show that the respondents were influenced by any extraneous considerations during the decision making process. The mere fact that the existing contractors were found to be the successful bidders cannot be taken as a ground to allege mala fides against the respondents.

As noted above, the tender committee consists of the senior officials of the 1st respondent who after thorough enquiry opined that the technical bid of the writ petitioner did not meet the specifications prescribed under the eligibility criteria. There is no reason for this Court to interfere with the said decision unless an element of

arbitrariness is made out or the decision is shown to be vitiated on account of mala fides or it can be termed as so unreasonable that no reasonable authority could have ever arrived at. On the basis of the material on record, none of the said grounds is made out by the petitioner."

Shri P. Venugopal, learned counsel for the appellant reiterated the points urged before the learned Single Judge and argued that the view expressed by her on the appellant's eligibility is ex facie erroneous and, therefore, the order under challenge is liable to be set aside. Learned counsel emphasised that the certificate issued by M/s.Chamundi Industries Limited of Bangalore speaks of shifting, stacking, loading/unloading of goods and other connected activities and, therefore, the respondents could not have rejected the appellant's bid. He then submitted that the price bid of the appellant was 10% less than the existing rates and this factor alone should have weighed with the learned Single Judge for directing respondent No.1 to entertain its tender.

Learned counsel for respondent Nos.1 to 5 supported the order under challenge and argued that rejection of the technical bid of the appellant does not suffer from any legal infirmity because it did not satisfy the condition of eligibility.

We have considered the respective submissions. Clause 5 of the tender notice, which prescribes the Special Conditions, reads as under:

"**Special Conditions** : The tenderers shall be consignment agents/handling agents/ manufacturers/stevedores etc., having experience in operating all activities of unloading from trucks/ trailers/rakes etc., stacking, loading, etc. from the stage of receipt of material to the stage of dispatch of material and should have handled pig iron and/or steel materials (semis and furnished products)/heavy machinery/any metal products for a minimum tonnage in any one of the preceding five financial years or current financial year with a grace provision of (-) 5 %, should have minimum turnover and should have land for a minimum area either in

their own name or held through a registered lease deed for 8 years as mentioned in the tabulation below. The experience certificate should also mention that the tonnage has been considered only once wherever the material is handled more than once."

Clause 11 of the instructions issued to the tenderers also reads as under:

"For participation in the tender, the tenderers should have the experience/qualification as mentioned below and submit the documents as mentioned below along with the tender. …

… … … …

i) The tenderers shall be Consignment Agents / Handling Agents / Manufacturers / Stevedorers, etc., having experience in operating all activities of unloading from trucks/trailors/rakes etc., stacking, loading etc., from the stage of receipt of material to the stage of dispatch of material and should have handled Pig Iron and/or Steel materials (semis & furnished products) / Heavy Machinery / any metal products for a minimum tonnage with a grace provision of (-) 5% as mentioned in the Open Tender Notice in any one of the preceding five financial years or the current financial year. The experience certificate should also mention that the tonnage has been considered only once wherever the material is handled more than once.

Proof of such experience should be submitted along with the tender in the following manner. The experience as traders, sister concerns and the experience certified by traders and sister concerns will not be considered.

(a) In case of material handled on contract basis, a certificate (in original) should be submitted from the Employer in the format enclosed as Annexure-II. The certificate should also mention the tonnage handled. The certificate should also mention that the tonnage has been considered only once, wherever the same material is handled more than once. In case the Employer is a private party, the certificate should be supported by copies of Work Order / Agreement and TDS Certificates.

(b) In case of material handled during the course of manufacturing, a certificate (in original) should be submitted from a Practising Chartered Accountant in the format enclosed as Annexure-III. The certificate should be supported by copies of

documents such as quantitative details from Audited Accounts to prove physical handling of material."

A conjoint reading of the above reproduced clauses shows that the bids of only those tenderers could be entertained, who had experience in operating all activities of unloading from trucks/trailers/rakes etc., stacking, loading etc. from the stage of receipt of material to the stage of despatch. In other words, the bids of those who did not have the requisite experience were liable to be rejected.

The experience certificate issued by M/s.Chamundi Industries Limited, Bangalore reveal that the appellant had undertaken job of shifting, stacking, loading/unloading of steel materials, but no evidence was produced to show that it had experience in operating all activities of unloading from trucks/ trailers/rakes etc. stacking, loading etc. from the stage of receipt of material to the stage of despatch of material. Therefore, the rejection of its bid cannot be characterised as arbitrary or violative of Article 14 of the Constitution.

There cannot be any doubt that respondent No.1 had the discretion to prescribe the conditions of eligibility for appointment as Consignment Agent for handling and storage of pig iron and steel materials at different places including Kochi and Bhubaneswar and to consider the tenders only of those who fulfilled the eligibility conditions. Therefore, the appellant, who did not satisfy the condition of experience, did not have the legitimate right to complain against the rejection of its tender and, in our considered view, the learned Single Judge did not commit any error by declining to entertain its prayer.

We also consider it appropriate to reiterate the observation made by the learned Single Judge that the appellant did not make any allegation of mala fides against the members of the technical committee, who had scrutinised the bids received pursuant to the tender notice. Therefore, the mere fact that the appellant's bid was

lower in terms of the price cannot lead to an inference that the appointment of respondent No.6 as Consignment Agent is vitiated due to arbitrariness or mala fide exercise of power.

In the result, the appeal is dismissed.

**G.S. SINGHVI, CJ**

June 19, 2007

**C.V. NAGARJUNA REDDY, J**

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[1] (1979) 3 SCC 489
[2] (1989) 3 SCC 293
[3] (1990) 3 SCC 752
[4] (1991) 1 SCC 212
[5] (1994) 6 SCC 651
[6] (1995) 1 SCC 478
[7] (1997) 1 SCC 738
[8] (1999) 1 SCC 492
[9] (2000) 2 SCC 617
[10] (2000) 5 SCC 287
[11] (2005) 6 SCC 138
[12] (2006) 10 SCC 1
[13] (2006) 10 SCC 236
[14] (2006) 11 SCC 548
[15] (2007) 2 SCC 588